Supreme Court, U.S.
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No. 00-

IN THE

# Supreme Court of the United States

JAMES C. BABER, III,

*Petitioner,*

*v.*

STATE OF FLORIDA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I.

Is the business records exception to the hearsay rule a "firmly rooted" exception allowing a hospital report of a laboratory test to be admitted as a business record to prove an essential element of a crime without any opportunity for confrontation?

II.

Do the Confrontation Clause and the Due Process Clause guarantee that a defendant have a meaningful opportunity to test the trustworthiness of a report of a medical laboratory test before the report is admitted under the business records exception to the hearsay rule?

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## OPINIONS BELOW

The revised decision of the Supreme Court of Florida is reported at *Baber v. State*, 775 So. 2d 258 (Fla. 2001). It is reproduced in the appendix at App. 1a-13a. The original August 31, 2000 decision, which differed by a single word, is not reported and not reproduced here. The decision of the Florida Fourth District Court of Appeal is reported at *Baber v. State*, 738 So. 2d 379 (Fla. 4th DCA 1999). It is reproduced in the appendix at App. 14a-20a.

## STATEMENT OF JURISDICTION

The original opinion of the Supreme Court of Florida was rendered on August 31, 2000. A revised opinion was issued on January 4, 2001, when rehearing was denied. App. 21a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

**Sixth Amendment (Confrontation Clause)**

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

**Fourteenth Amendment (Due Process Clause)**

> Section 1. . . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

## STATEMENT OF THE CASE

Petitioner James Baber was convicted of DUI (driving under the influence of alcohol) manslaughter and DUI causing personal injuries. In the early evening, he was observed driving erratically, and made a left turn onto a divided street, heading west into an eastbound lane of traffic. He struck an oncoming vehicle, killing the driver and injuring the passenger.

Petitioner was taken to a hospital for treatment of his injuries, and there his blood was collected and the serum was tested for the presence of alcohol using a DuPont ACA IV clinical analyzer, a standard hospital testing instrument. The test result was reported to be 274 mg/dl, which at trial was mathematically converted to a whole blood alcohol level of .23 to .25 g/dl. The criminal charge required the State to prove a blood alcohol concentration in excess of .20 g/dl. No blood sample remained for forensic testing, or for petitioner to have independently tested.

The hospital blood alcohol report was introduced *via* a records custodian, under the business records hearsay

exception, section 90.803(6), Florida Statutes (1995), which provides in relevant part:

> (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY -
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association profession, occupation, and calling of every kind, whether or not conducted for profit.

In addition to the records custodian, who had no knowledge of the test, the State offered testimony of the hospital chemistry laboratory supervisor, who testified generally about the procedures leading to such a report, but who also had no personal knowledge of petitioner's test. The laboratory technician who had performed the test and the original test result contained on a tape printout produced by the DuPont ACA IV analyzer were not available. The technician

could not be found, and the tape printout was lost.[1] Over a defense Confrontation Clause objection, the business record report of the test result was admitted.[2] In response to defense counsel's arguments, the trial judge said, "If you are correct, and I don't admit the report, the case is over."

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[1] Failing to retain the instrument printout violated the Florida Agency for Health Care Administration Regulations governing clinical laboratories, Section 59A -7.028 (Patient Test Management), which provides in relevant part:

> (4) **Test records**. The laboratory must maintain a record system to ensure reliable identification of patient specimens as they are processed and tested *to assure that accurate test results are reported*. Records shall be retained in their original form or stored on microfilm, microfiche or other photographic record, magnetic tapes or other media in an electronic data processing system. These records must identify the personnel performing the testing procedure. *Records of patient testing, including, if applicable, instrument printouts, must be retained for at least two years*. (emphasis supplied).

[2] The federal issue was raised and preserved. Petitioner raised the Confrontation Clause as an objection to the admission of the hospital report in a pretrial written Motion in Limine to Exclude Blood Test Results. R2-229, 234. The constitutional claim was argued to the trial court prior to the admission of the report. R7-587-589 ("It also does deprive us – deprives us of a right to confrontation of the witness because in this case it's very significant, it's their entire case. That one slip of paper is their entire case and I don't get to cross-examine that witness about how it was made."); R7-633-634. The Confrontation Clause was also raised in the District Court of Appeal (Initial Brief, pp. ii, iii, 10, 14, 17, 33, 35, 36) and in the Supreme Court of Florida (Initial Brief, pp. 14, 21-23). The courts below addressed and rejected petitioner's constitutional argument. App. 4a-10a; 19a.

With the admission of the hospital blood alcohol report as a business record hearsay exception, the trial continued. Petitioner was convicted and sentenced to fifteen years imprisonment. The conviction was affirmed by the Florida Fourth District Court of Appeal, but that court certified a question of great public importance to the Supreme Court of Florida. The certified question was whether state law, allowing the introduction of medical blood alcohol results under the business records exception in civil cases, applied in criminal cases, when the records are offered as proof to establish an element of the offense. App. 1a.

The Supreme Court of Florida granted discretionary review, answered the certified question in the affirmative, and approved the district court's decision. The Supreme Court of Florida discussed the Confrontation Clause issues at length, canvassing federal and state law, and concluded that business records enjoy such a presumption of reliability that the Confrontation Clause is not offended by the use of the business records exception against a criminal defendant, generally. However, the court cautioned:

> We emphasize, however, that *defendants must be given a full and fair opportunity to contest the trustworthiness of such records before they are submitted into evidence.*

App. 12a-13a (emphasis supplied).

Despite that admonition, the court did not address the fact that petitioner had no such opportunity to test the

trustworthiness of the hospital business record, or to attempt to rebut its presumption of reliability, because the technician was unavailable and the original DuPont instrument printout result had not been maintained according to law. Petitioner sought rehearing on that basis, but rehearing was denied. App. 21a.[3]

Certiorari review is sought because of the substantial Confrontation Clause and Due Process implications of the decision below.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION REGARDING THE GUARANTEES OF THE CONFRONTATION AND DUE PROCESS CLAUSES AS APPLIED TO MEDICAL LABORATORY REPORTS ADMITTED UNDER THE BUSINESS RECORDS HEARSAY EXCEPTION

In *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), the Court said that "the absence of proper confrontation at trial `calls into question the ultimate "integrity of the fact-finding process."'" (citations omitted). Exceptions to the Confrontation Clause are carefully circumscribed: "the Clause countenances only hearsay

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[3] The revised opinion, issued with the denial of rehearing, corrected an apparent mistake in the original opinion, which had stated in its concluding paragraph that "defendants must be given a full and fair opportunity to contest the *relevancy* of such records . . . ." (emphasis supplied). In the revised opinion "trustworthiness" was substituted for "relevancy." App. 12a-13a.

marked with such trustworthiness that `there is no material departure from the reason of the general rule.'" *Id.* at 65 (citations omitted). The Court wrote:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.

*Id.*, at 66.

This Court has not held that business records generally, or hospital records that are non-original reports of medical laboratory tests, fall within a "firmly rooted" exception to the rule against the admission of hearsay. The closest the Court has come in the business records context is a footnote to a sentence saying "that certain hearsay exceptions rest upon such solid foundations that virtually any evidence within them comports with the substance of the constitutional protection." *Ohio v. Roberts*, 448 U.S. at 66. The footnote said: "*See, e.g.* . . . Comment, 30 La. L. Rev. 651, 668 (1970) ("Properly administered the business and public records exceptions seem to be among the safest of the hearsay exceptions." 448 U.S. at 66.

Thus, the important but yet unanswered questions are whether the business records exception is so "firmly rooted"

that such records may be admitted without adherence to the Confrontation Clause; whether hospital reports of medical laboratory tests fall within that "firmly rooted" exception; and, if so, whether "properly administered" means that a defendant must have a meaningful opportunity to test the trustworthiness of the record. Answering the questions would provide the opportunity to examine "the current connection between the Confrontation Clause and the hearsay rule," a "link" that a member of the Court has said may be a "question open for another day." *Lilly v. Virginia*, 527 U.S. 116, 142-143 (1999) (Breyer, J., concurring).

While many courts have held business records, including hospital business records, to be a "firmly rooted" hearsay exception,[4] none of them has held that in a criminal case a hospital business record of a laboratory report is admissible even if the defendant has no meaningful opportunity to test the trustworthiness of the record. Here, there was no blood for the defendant to test, the actual test result was lost, *and* the technician who performed the test, saw the original result, and made the computer data entry, could not be found. Thus, even if a hospital business record could be viewed as trustworthy enough to be presumptively admissible, only the Florida Supreme Court has held that the Confrontation Clause permits the admission of business records to establish the essential element of a crime in a case in which there is *no way*

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[4] *See, e.g.*, the cases cited by the court below (App. 8a-10a).

to confront and test the reliability of the non-original hospital record.[5]

The Supreme Court of Florida's revision of its original opinion, saying that "defendants must be given a full and fair opportunity to contest the trustworthiness of such records before they are submitted into evidence" (App. 12a-13a), pays lip service to the Confrontation and Due Process Clauses, but underscores the constitutional violations in this case because the instrument printout and the technician were lost, and there was no blood to retest.

Certiorari should be granted to resolve whether non-original reports of hospital test results are subject to the protections of the Confrontation Clause and the Due Process Clause, or whether they fall within a "firmly rooted" hearsay exception, which would permit their admission into evidence even if there is no meaningful method to challenge their accuracy.

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[5] The absence of the instrument printout was particularly prejudicial. A state crime lab expert in this case admitted that when blood alcohol is measured in a forensic laboratory the original gas chromatography charts are maintained, and would be available for comparison with the final reported results. Petitioner did not have that opportunity. None of the procedural safeguards utilized by forensic laboratories (*i.e.*, duplicate testing, testing of standards prior to each test, retention of the original test results) (*see* § 11D-8.013, Fla. Admin. Code) were present in this case. Indeed, DuPont does not recommend its ACA-IV analyzer for forensic blood alcohol determinations.

## II. CONFLICT BETWEEN THE FLORIDA AND MISSISSIPPI SUPREME COURTS ON THE CONFRONTATION CLAUSE IMPLICATIONS OF THE ADMISSION OF LABORATORY REPORTS UNDER THE BUSINESS RECORDS EXCEPTION WARRANTS CERTIORARI REVIEW BY THIS COURT

The Supreme Court of Florida has now held that the admission of laboratory test reports under the business records exception to establish an element of a crime (without the original test result or the testimony of the person who performed the test), does not violate a criminal defendant's rights under the Confrontation Clause. App. 12a-13a. The court below expressly acknowledged that the Mississippi Supreme Court has come to the opposite conclusion in *Kettle v. State*, 641 So. 2d 746 (Miss. 1994), but "disagree[d] with *Kettle* to the extent it is contrary to the majority view. . . ." App. 10a-12a.

*Kettle v. State*, which involved cocaine tests performed in a state crime laboratory, held that a mere custodian of records can "introduce the records in his care and custody, [but] he cannot satisfy the right to confront witnesses *when properly invoked*." 641 So. 2d at 749 (emphasis supplied).

> Under Rule 803(6), therefore, a custodian of the records of the Mississippi Crime Lab may introduce laboratory reports, *except where the defendant objects on the ground that his Sixth*

> *Amendment right to confront the person who prepared the test is being violated.*

*Kettle*, 641 So. 2d at 750 (emphasis supplied).

The Mississippi Supreme Court acknowledged that "[w]hen the Sixth Amendment right to confrontation arises, the ultimate question is whether hearsay evidence offered qualifies under a `firmly rooted hearsay exception.' *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L.Ed.2d 597, 608 (1980). *See also Bourjaily v. U.S.*, 483 U.S. 171, 182, 107 S. Ct. 2775, 2782-83, 97 L.Ed.2d 144, 157 (1987)." *Kettle*, 461 So. 2d at 750. But the Mississippi Supreme Court, unlike the Florida Supreme Court, refused to admit a laboratory test against a defendant without giving the defendant an opportunity to test the trustworthiness of the business record.

This Court should grant review to resolve the conflict between Florida and Mississippi. Resolution of that conflict will establish the contours of the Confrontation Clause nationwide in the context of this important area – the admission of the unconfronted report of scientific or laboratory test results as a bare business record to establish the essential element of a crime.

If the Florida approach prevails, forensic laboratory testing in DUI cases could become passé. Why would a state use the careful forensic test methodologies designed to insure accurate and reviewable blood alcohol results, when a simple hospital business record, without more, is admissible and insulated from confrontation and cross-examination?

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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